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Stealing 'souls'? Article 8 and photographic intrusion

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Abstract

In Article 8 ECHR privacy right jurisprudence, photographs are deemed distinct forms of information that are particularly intrusive in nature. This article is concerned with explaining why this is so. Part 1 examines the notion of 'intrusion' itself. It argues that 'intrusion' functions as a legal metaphor and plays an important role in constructing a binary between an outer self presented to the world and a 'spiritual', emotional interior that privacy purports to protect from transgression. Part 2 argues that this 'spiritual intrusion' metaphor is influential in the continental personality right that informs the ECtHR's approach to Article 8 protection for photographed individuals. This leads to potentially stronger protection for image, including a basic Article 8 right to control one's image. Yet there is a divergence of approach in the English courts, where personality theory has limited influence; here there is traditional scepticism towards an image right and photographic capture is largely neglected. Part 3 argues that photography becomes a relevant factor at publication stage, where courts agree that the distinctive features of the medium may cause or exacerbate intrusion. This is because photography creates a permanent, infinitely replicable 'truthful' record of the individual's image that can be disseminated to the objectifying gaze of a mass audience. But the medium also leads viewers to overlook its inherent complexities and ambiguities. Ultimately, Article 8 jurisprudence, particularly in the ECtHR, occasionally adopts reasoning that contains echoes of the 'photographs steal souls' mythology.

Keywords: privacy; Article 8; media; photographs; misuse of private information; image

Introduction

Photography: an art form; an industry; a ubiquitous social practice and a 'tool of power'.[1] Susan Sontag, the cultural commentator who coined this latter term, noted the mass proliferation of photographs, claiming they 'alter and enlarge our notions of what is worth looking at and what we have a right to observe'.[2] Yet as early as 1931, Walter Benjamin claimed that the social functions of photography, rather than its aesthetic implications, warranted investigation.[3] It is photography's social and ethical implications, its effects as a

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1 Susan Sontag, *On Photography* (Penguin 1979) 8.

2 Ibid 3.

3 Walter Benjamin, *A Short History of Photography* (Penguin) 22.

'tool of power', that Article 8 European Convention on Human Rights (ECHR) privacy case law has had to address. It is perhaps inevitable that the practice of photography, which 'began, historically, as an art of the Person: of identity, of civil status',[4] should have come to engage issues regarding the Article 8 right to respect for private and family life,[5] which encompasses a person's image,[6] identity[7] and control over personal information.

This article investigates photographs of people in Article 8 case law in the European Court of Human Rights (ECtHR) and English courts. It particularly draws upon misuse of private information (MPI), a common law tort where courts balance the Article 8 privacy rights of claimants who wish to prevent publication of private information (including photographs) against the Article 10 free expression rights[8] of media defendants. The action is thus concerned with the rights that Article 8 may afford the subject of a photograph, as distinct from the rights of the photographer and/or copyright owner.[9] The privacy right analysed here can also be distinguished from the commercial interest in exploiting one's image.[10]

Though both the medium of photography and the legal protection of image have been subject to a good deal of academic attention, much of the latter is American and tends to focus on historical matters and/or commercial image rights.[11] More importantly, no sustained attention has been paid to ascertaining *why* the photographic medium is deemed distinct from, and more intrusive than, other forms of information. This article analyses judicial approaches to photographs in Article 8 case law to address this very issue. Though it identifies diverging approaches to the degree of protection that Article 8 may afford the subjects of photographs, it does not seek to advance any argument in this regard (though, of course, it may be used as basis for such future work). Instead, this article's contribution lies in opening up privacy law discourse to reveal the cultural–historical influences that shape legal understandings of both intrusion and the medium of photography. In doing so, it seeks to uncover the non-rational elements that remain sedimented in the history of contemporary rational legal discourse, and to ascertain whether such traces which have legal influence.

Part 1 discusses the terminology of 'intrusion', and how this crucial metaphor in privacy discourse evolved in the late nineteenth century, partly in response to concerns about new photographic technology. Of particular interest is the intrusion metaphor's role in constructing the notion of an inner spiritual sanctum that may be invaded. Part 2

4 Roland Barthes, *Camera Lucida* (Vintage 2000) 79.

5 Article 8(1) ECHR.

6 *Schussel v Austria* [2002] App 42409/98, Complaints [2]; *Sciacca v Italy* (2006) 43 EHRR 20, [29].

7 '[P]rivate life extends to aspects relating to personal identity, such as a person's name, photo or physical and moral integrity.' *Rothe v Austria* [2012] ECHR 6490/07, [42]. See also: *Reklos and Another v Greece* [2009] 27 BHRC 420, [39].

8 Article 10 ECHR.

9 The photographer who takes a photograph is the author and (in most cases) owner of copyright in that work: ss 9 and 11 Copyright Designs and Patents Act 1988. The owner of a copyright work has the exclusive right to commercially exploit the work (s 16).

10 Protection for commercial image rights varies across jurisdictions. In the UK, a celebrity's image can be protected by intellectual property laws, most notably copyright, passing-off and breach of confidence. In US law there is an additional commercial appropriation tort. In continental jurisdictions, such as Germany, rights to control commercial exploitation of image are covered by the personality right.

11 Though some articles involve discussion or comparison of privacy and commercial publicity rights: Jeffrey Malkan, 'Stolen photographs: personality, publicity, and privacy' (1997) 75 Texas Law Review 779; Jonathan Kahn, 'Bringing dignity back to light: publicity rights and the eclipse of the tort of appropriation of identity' (1999) 17 Cardozo Arts and Entertainment Law Journal 213; Robert C Post, 'Rereading Warren and Brandeis: privacy, property, and appropriation' (1991) 41 Case Western Reserve Law Review 647.

proceeds to argue that this 'spiritual intrusion' metaphor informs the ECtHR's approach to Article 8 and photography. Its approach, rooted in the continental personality right, sees an individual's image as closely correlating to – indeed determining – their 'inner' self or spirit; as such, it suggests greater protection for an individual's image, even at capture stage. In contrast, the English courts, less influenced by notions of personality and the 'spiritual intrusion' metaphor, are wary of protecting image and neglect photographic capture. Part 3 analyses the characteristics of photography which mark it out as a distinctive medium that can cause or exacerbate intrusion at publication stage. It finds that courts treat photographs as particularly intrusive because they create a permanent, detailed visual record of an individual at a given moment, and can enable that person to be subjected to the actual or potential gaze of multiple spectators. Furthermore, such images generally enjoy the status of 'truth' despite their limited constructed nature.

The photo/text distinction

In Article 8 disputes judges employ a photo/text distinction, viewing photographs as a form of information that is innately *different* to text-based information. When considering whether a disputed story violates Article 8, the courts split the material into discrete categories, and may allow publication of certain features (e.g. the bare facts of a story) whilst restricting others (e.g. the claimant's identity or salacious details). For these purposes, stories are routinely split into textual and photographic elements. For example, *Theakston* concerned a claimant television presenter's attempt to prevent publication of a story about his visit to a brothel, including photographs of him taken whilst there.[12] Ousley J split the proposed story into three elements – the bare fact of the brothel visit, details of the sexual activity in the brothel and the accompanying photographs – claiming that different considerations applied to each.[13] He granted an injunction to restrict the details and photographs, but not the bare fact of the story which had a public interest dimension. Similarly, in the leading case of *Campbell*, the Law Lords dealt with photographs of the claimant on a street leaving a Narcotics Anonymous meeting separately to the main story, seeing the photographs as the last of five categories of information.[14] This text/image distinction has been explicitly confirmed by the highest English courts. In *Douglas* the Court of Appeal stated:

> *Special considerations* attach to photographs in the field of privacy. They are *not merely a method of conveying information* that is an alternative to verbal description . . . As a means of invading privacy, a photograph is *particularly intrusive*.[15]

A text/photograph distinction was also acknowledged when *Douglas* reached the House of Lords; despite his dissenting judgment, Lord Walker acknowledged that 'English law has . . . recognised that there may be something special about photographs.'[16] The recent case of *Ali* confirmed that these points about photography are equally applicable to the visual medium of film.[17] The 'special' nature of photographic information has also been

12 *Theakston v MGN* [2002] EWHC 137, [77].

13 Ibid [24].

14 Lord Nicolls (dissenting) accepted the claimant counsel's splitting up of the *Campbell* story into various elements, the fifth of which was the 'visual portrayal of her leaving a specific meeting with other addicts': *Campbell v MGN Ltd* [2004] UKHL 22, [23] (Lord Nicholls). See also [88] (Lord Hope).

15 Emphasis added. *Douglas and Others v Hello!* [2005] EWCA Civ 595, [84]. Quoted in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, [19]. See also: *Rothe* (n 7) [74]; *Jagger v Darling and Others* [2005] EWHC 683, [11], [14], [15].

16 *Douglas and Others v Hello!* [2007] UKHL 21, [287]. See also [288].

17 *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298, [150]–[151]. Though this article focuses on photographs, much of the analysis is thus also broadly applicable to related visual media such as film and video.

noted by the ECtHR in *Von Hannover (No 1)* which involved photographs of the applicant, Princess Caroline of Monaco, going about her daily life, for example eating in restaurants, shopping and participating in sports. Here the court stated that the

> . . . publication of photos . . . is an area in which the protection of the rights and reputation of others takes on *particular importance*. The present case does not concern the dissemination of 'ideas', but of *images containing very personal or even intimate 'information' about an individual*.[18]

Later, in *Rothe v Austria* the ECtHR upheld the national court's findings that an exposé of homosexual activity in the Catholic church with accompanying photographs did not violate Article 8 because the story contributed to a debate of general interest. It nonetheless held that the national courts did not sufficiently distinguish between the text and photographs in the report, and that the rights at stake should have been balanced separately, particularly as the publication of photographs was a more borderline issue.[19]

In summary, a key principle guiding judicial treatment of photographs in Article 8 cases is that they are distinct and separable forms of information that are 'special' and raise profound privacy issues due to their intrusive nature. Before considering the specific features of photographs that make them more intrusive than equivalent textual accounts in Part 3, it is necessary to examine the notion of 'intrusion' itself.

1 What is intrusion?

Though intrusion occupies a central role in the vocabulary of privacy discourse, it is a phenomenon that the law finds difficult to articulate, though leading academics have provided recent valuable doctrinal analyses.[20] Taking an alternative approach, this part demonstrates how 'intrusion' operates as a metaphor across privacy literature to represent a range of activities as the transgression of a protected, boundaried 'inner'.

The term 'intrusion' originated from the Latin words '*trudere*' or '*trusum*' (to thrust) and '*in*' (in) and these essential meanings endure. The *Chambers Dictionary* offers the following definitions:

> Intrude: (intransitive verb) to thrust oneself in; to enter uninvited or unwelcome. . . . to force in.
>
> Intrusion: (noun) an act of intruding; encroachment.
>
> Intrusive: (adjective) tending or apt to intrude; intruded; inserted without etymological justification; entering without welcome or right.[21]

Across these meanings it is clear that intrusion entails some form of unwanted (*uninvited*, *unwelcome*, *without justification*) movement (*entry*, *force in*, *insert*, *encroachment*) to an inside (*in*). Such an understanding necessarily entails two assumptions; first, that there is some form of 'outer' or other distinct from the 'inner'; second, that there is some form of boundary or border that is transgressed in the process of 'moving' 'in'. These features of 'intrusion' map harmoniously on to physical activities that historically impacted upon individual

18 *Von Hannover v Germany (No 1)* [2004] EMLR 21, [59]. Quoted in *Douglas* (n 15) [87]. This point was reiterated in *Von Hannover v Germany (No 2)* [2012] ECHR 40660/08. See also *Rothe* (n 7) [47]; *Eerikainen and Others v Finland* [2009] ECHR 3514/02, [70]; *Egeland and Hanseid v Norway* (2010) 50 EHRR 2, [59].

19 *Rothe* (n 7) [73], [77]

20 See e.g. Nicole Moreham, 'A conceptual framework for the New Zealand tort of intrusion' (2016) 47(2) Victoria University of Wellington Law Review 265–86. <www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/volume-47,-issue-2/Moreham-.pdf>; Paul Wragg, 'Recognising a privacy-invasion tort: the conceptual unity of informational and intrusion claims' (forthcoming).

21 *Chambers Dictionary* 10th edn (Chambers 2006) 783.

privacy, for instance trespass on to land or the home. For example, in *Semayne's Case* (1604) the court stated 'the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose'; it set up the front door of a dwelling as a boundary that should not be crossed except in limited circumstances.[22]

Across the latter half of the nineteenth century the intrusion-based terminology employed for physical land came to be applied to the physical person. Samuel Warren and Louis Brandeis' seminal 1890 article made an important contribution to this development. It called for the legal recognition of privacy rights, drawing upon select cases in copyright and confidence to argue that the underlying interest at stake was not property, but privacy.[23] In presenting it as a free-standing interest they 'disentangled' privacy from property.[24] Yet, in the process, Warren and Brandeis nevertheless retained property-based terminology:

> The common law has always recognised a man's house as his castle, impregnable, often, even to its own officers engaged in execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?[25]

Similar use of property-based terminology is evident in *Pavesich* (1905), the first US case to explicitly recognise the right to privacy. Here, the overlap between privacy and property rights in early common law was noted by Cobb J, who held that unauthorised use of a photograph of the plaintiff for the defendant's newspaper advert was 'a trespass upon his right of privacy'.[26] Cobb J quoted *Semayne's Case* above and, in light of 'new conditions' such as modern 'instantaneous photography', advocated extending such legal principles that protected persons from 'attack'.[27]

It is arguably no coincidence that the first case to explicitly acknowledge a privacy right involved photography, or that the development of privacy doctrine broadly corresponded with the emergence of this new technology in the late nineteenth century. During this time US courts dealt with a spate of disputes over photographic material,[28] and indeed Warren and Brandeis identified 'instantaneous photographs' as one of the new technological advances that posed a threat to privacy.[29] Various commentators have also noted the era's growing concern about the effects of unmitigated market forces and the perceived risks of commodifying one's person.[30] The mass uptake of photography – and particularly the activities of amateur photographers – prompted widespread censure, with critics expressing 'lurking feelings of fascination, discomfort, and anxiety provoked by photography'.[31] Mensel cites this as one factor leading to the emergence of New

22 5 Co Rep 91, 91b.

23 S Warren and L Brandeis, 'The right to privacy' (1890) 4(5) Harvard Law Review, 193–220, 211, 205.

24 Post (n 11) 648.

25 Warren and Brandeis (n 23) 220.

26 *Pavesich v New England Life Insurance Co et al* (1905) Ga LEXIS 156, 222 (Cobb J).

27 Ibid 197–8, 214–15.

28 A useful overview of nineteenth-century US photograph cases (and the influence of notions of property therein) is provided by John R Fitzpatrick, 'The unauthorized publication of photographs' (1932) 20 Georgetown Law Journal 134.

29 'Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life'. Warren and Brandeis (n 23) 195–6. See also 206.

30 Edward Bloustein, 'Privacy as an aspect of human dignity: an answer to Dean Prosser' (1964) 39 New York University Law Review 964, 988; Kahn (n 11) 216; Samantha Barbas, 'The laws of image' (2012) 47 New England Law Review 23, 64.

31 Robert E Mensel, '"Kodakers lying in wait": amateur photography and the right of privacy in New York, 1885–1915' (1991) 43(1) American Quarterly 24–45, 29. See also 32, 33.

York's privacy laws at the turn of the twentieth century.[32] Barbas similarly notes the 'visual revolution' initiated by cameras and other visual technologies. Between 1880–1920 this combined with urbanisation, mass media and 'aggressive Gilded Age individualism' to create a cultural shift that placed emphasis on successful self-presentation in public.[33] Against this cultural backdrop, Barbas sees the privacy tort as 'the legal manifestation of a nascent appearance-conscious, image-conscious culture'.[34]

As a result of these early developments the term 'intrusion' came to be employed more widely than the limited context of physical trespass onto land. 'Intrusion' is now used in privacy discourse in relation to a range of activities that engage privacy interests, including photography. When used in this wider sense, 'intrusion' operates as a legal metaphor which has been rarely noted, though not subjected to further examination.[35] The 'intrusion' metaphor orients and structures our understanding of phenomena (e.g. being photographed without our knowledge) in more delineated and concrete ways (e.g. as a spatial transgression of a boundary). In doing so, it shapes or constructs our experience of reality.[36] The intrusion metaphor, rooted in property, is an enduring influence in this area. In the process of 'disentangling' privacy from property, Warren and Brandeis ironically extended property-based terminology to the individual. The legacy of this development is that the metaphorical transgression from an 'inner' to an 'outer' recurs across academic literature on privacy in various forms.

Hughes, for example, claims that mixed boundaries *create* privacy; it occurs when an individual or group 'successfully employ barriers to obtain or maintain a state of privacy'[37] These barriers can take three forms: first, physical (non-metaphorical) ones, such as walls and doors; second, behavioural barriers that communicate our wishes to others by words or actions, for example asking to be left alone or putting one's hand over a camera lens; third, normative barriers, for instance social norms or laws that prohibit certain activities. According to Hughes, 'an invasion of privacy occurs when physical and behavioural barriers are penetrated'[38] and access to the privacy seeker is obtained, though such transgressions are highly context-specific and may occur in different ways. Descheemaeker's analysis of privacy harms also utilises the transgression of boundaries. He identifies three categories of harm that may arise when privacy is breached: financial loss, mental harm (both of which involve concrete, discernible harms) or loss of privacy per se (where violation of the right *is* the loss, albeit an abstract one).[39] He cites *Gulati* as an example of the law recognising the latter. Here the court awarded damages to claimants whose phones had been hacked by the *News of the World* despite the fact they had been unaware of the intrusion.[40] This approach sees the violation of a right as wrong

32 Ibid 24–5.

33 Barbas (n 30) 28–38. A similar cultural shift towards self-presentation is identified by Mensel (n 31) 26.

34 Barbas (n 30) 26.

35 James Whitman, 'Two Western cultures of privacy: dignity versus liberty' (2004) 113 Yale Law Journal 1151, 1194. See also Jonathan Kahn, 'Privacy as a legal principle of identity maintenance' (2003) 33 Seton Hall Law Review 371, 379, 393, 383, 394.

36 I have examined the effects of metaphors, such as rights-balancing, in privacy law elsewhere. 'A just balance or just imbalance? The role of metaphor in misuse of private information' [2015] 7(2) Journal of Media Law 196–224, 208–10, 213.

37 Kirsty Hughes, 'A behavioural understanding of privacy and its implications for privacy law' (2012) 75(5) Modern Law Review 806–36, 807.

38 Ibid 812, 814.

39 Eric Descheemaeker, 'The harms of privacy' (2015) 7(2) Journal of Media Law 278, 279, 286. Descheemaeker claims that harms to dignity can be understood within his second and third categories: 284–5.

40 *Gulati v MGN Ltd* [2015] EWHC 1482, [168].

in itself, irrespective of other concrete losses that might flow from it. In this context, Descheemaeker claims, rights such as privacy 'form a *sphere* of protection around the plaintiff' to protect certain social goods or interests. Where 'His interests have been *invaded* . . . that *is* the detriment, harm or loss that he has suffered' and the right must be restored.[41] In doing so, Descheemaeker extends spatial terminology such as 'invasions' of 'spheres' to abstract rights.

Elsewhere, at doctrinal level, there is emerging academic consensus that the English common law should develop to recognise intrusion as a legal wrong in itself, as in New Zealand and the USA.[42] Moreham advocates an intrusion tort distinct from information misuse, conceiving 'intrusion' in physical terms as 'unwanted access to one's physical self'. This would cover intrusion into physical privacy by watching, listening and/or recording an individual when they have a reasonable expectation of privacy; such activities violate dignity, autonomy and cause real emotional harm in themselves, irrespective of what might be done with any information obtained as a result.[43] Implicit in Moreham's definition is that to obtain physical access to an individual against their wishes, the intruder must cross either physical or metaphorical (e.g. behavioural) barriers. These select examples show sophisticated, technical uses of the 'intrusion' metaphor, but an alternative use of this metaphor in privacy discourse is particularly pertinent to photography; the notion of a transgression *into* a person's 'spiritual' interior. This intriguing and important example thus warrants further attention.

1.1 The 'spirit' and the intrusion metaphor

Reflecting the more fundamental mind/body dualism, the intrusion metaphor is also employed in privacy literature to represent the crossing of a boundary into a person's 'inner' life, though this 'inner' aspect is articulated in various ways. Select liberal theorists draw a distinction between the 'outer' self presented to the world and one's 'inner' life or feelings which privacy is ultimately concerned with protecting.[44] For example, Nagel explores the boundaries between what individuals conceal and expose publicly. He argues concealment is an important aspect of civilisation, and a degree of control over what we reveal is crucial.[45] In doing so, he sees the public 'self' as a sort of shield so that the inner life can be free and protected 'from the crippling effects of the external gaze'.[46] Elsewhere, Simmel claims that a private sphere of unknowability surrounds every human; his writing is replete with references to a 'sphere' or 'boundary' that we cannot 'cross', 'invade' or 'penetrate without disturbing the personal value of the individual'.[47] Simmel's argument is based on the notion that our body is our 'property' and thus 'every invasion of this possession is resented as a violation of the personality; so that there is a spiritual private property, to invade which signifies violation of the ego at its centre'.[48] Bloustein

41 Descheemaeker (n 39) 279, 288, 289–90.

42 Nicole Moreham, 'Beyond information: physical privacy in English law' (2014) 73(2) Cambridge Law Journal 350–77; Wragg (n 20).

43 Moreham (n 42) 352–5. See also Moreham (n 20) 4–5, 10–11, 16.

44 Commentators on intrusional privacy law agree that it is concerned with addressing harms, including harm to feelings, emotional harm and mental distress: Wragg (n 20); Moreham (n 20) 10–11.

45 Thomas Nagel, 'Concealment and exposure' (1998) 27(1) Philosophy and Public Affairs 3–30, 4.

46 Ibid 17.

47 Georg Simmel, 'The sociology of secrecy and secret societies' (1906) 11(4) American Journal of Sociology 441–98, 453–4.

48 Emphasis added. Ibid 454. Then later: 'The right of that spiritual private property.'

similarly claims that though legal vocabulary is 'exceedingly limited', privacy deals with 'in some sense a spiritual interest'.[49]

Consistent with the view that privacy laws are concerned with a spiritual 'inner life' we even see explicit references to the 'soul', for example, in the work of Marx[50] and Shils,[51] and, on occasion, case law.[52] The idea of 'the soul' is tied to the Judeo-Christian view of the sanctity of life, a 'religionist' ethos which holds that 'Human life is divinely valued and valuable; we are all sacred. We all have the spark of the divine.'[53] This ancient, religious reverence for the soul-bearing person was a background influence at the very outset of the emergence of privacy discourse in the nineteenth century. Warren and Brandeis' primary concern for 'man's spiritual nature'[54] and 'inviolate personality',[55] including thoughts, feelings and intellect, is widely noted. Elsewhere they lament invasions of the 'sacred precincts' of private life.[56] In doing so, the authors were also arguably articulating subtle cultural shifts in the late Victorian American bourgeoisie regarding 'the enhanced role of feeling, emotion, or sentiment as aspects of selfhood' and a 'fascination with inner feeling'.[57] Furthermore, they were also arguably seeking to protect this inviolate personality from rapidly expanding market forces. Kahn writes:

> In a world where everything was being turned into a commodity, champions of privacy felt a pressing need to identify and *protect the non-fungible 'spiritual nature' of man*. 'Identity' in particular was increasingly becoming subject to commodification.[58]

Traces of a spiritual or sacred aspect to being human continue in modern secular privacy discourse in the form of dignity, the notion that 'each human being possesses an intrinsic worth that should be respected'.[59] McCrudden's account of the concept's history shows that its development involved a combination of religious and non-religious influences, for instance, from Roman law and later Kant.[60] Naffine explains that the 'religionist' veneration of the sanctity of human life 'is sometimes expressed as innate or inherent

49 Emphasis added. Bloustein (n 30) 1002.

50 'Surveillance abuse . . . can be seen as an assault on the soul – the very essence of the self beyond the tangible.' Gary T Marx, *Windows into the Soul, Surveillance and Society in an Age of Technology* (University of Chicago Press 2016) 318, 319.

51 'The 'social space' around an individual, the recollection of his past, his conversation, his body and its image, all belong to him. . . . He possesses them and is entitled to possess them by virtue of the charisma which is inherent in his existence as an individual soul – as we say nowadays, in his individuality'. Edward Shils, 'Privacy: its constitution and vicissitudes' (1966) 31 Law and Contemporary Problems 281, 306.

52 See e.g. *X County Council v C* [2007] EWHC 1771 (Fam), [38] (Munby J); *R (Johns) v Derby City Council and Another* [2011] EWHC 375 (Admin), [97] (Munby LJ). These examples are offered by Jill Marshall, *Human Rights Law and Personal Identity* (Routledge 2014). See also *Onassis v Christian Dior* 122 Misc 2d 603 (1984). In this US image rights dispute, the court stated that the relevant New York statute 'is intended to protect the *essence* of a person, his or her identity or persona from being unwittingly or unknowingly misappropriated for the profit of another' (emphasis added).

53 Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford 2009) 23, 25. See also ch 7.

54 Warren and Brandeis (n 23) 193.

55 Ibid 211, 205.

56 Ibid 195.

57 Mensel (n 31) 24, 26. See also: 40.

58 Emphasis added. Kahn (n 11) 221, 222.

59 Christopher McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19(4) European Journal of International Law 655–724, 723. See also Charles R Beitz, 'Human dignity in the theory of human rights: nothing but a phrase?' (2013) 41(3) Philosophy and Public Affairs 259–90, especially 272.

60 A good overview of the history of dignity is set out at: McCrudden (n 59) 656–63.

dignity or human inviolability, but the message is largely the same'.[61] In this sense, dignity can be seen as representing an alternative means of expressing concern for the human 'spirit' or 'soul', albeit one that is not necessarily reliant on religious faith. Indeed, Marshall claims that dignity is 'the modern day successor to the soul',[62] and that:

> This soulish self is often presented as a unitary, whole, apparently unchanging core or essence of who we are. Notions of the soul, as the core of our essence, remain strong in human rights law.[63]

One likely reason for this influence is dignity's crucial foundational role in the drafting of international human rights (IHR) treaties in the post-Second World War era. Dignity was adopted as a basis for human rights; its utility was that it enabled parties of very different religions and political stances to agree the texts of IHR treaties whilst holding different understandings of what 'dignity' meant: 'Everyone could agree that human dignity was central, but not why or how.'[64] Dignity thus supplanted 'God' or 'nature' as the basis of rights.[65] But one crucial consequence of dignity's enhanced role was, according to Naffine, a 'fortification of the tendency among lawyers to ascribe inherent (and necessarily pre-legal) spiritual value to human beings'.[66]

Privacy and dignity are closely entwined, and the courts have acknowledged that dignity underlies Article 8 in cases such as *Campbell*,[67] *PJS*,[68] *Mosley*,[69] *Richard*[70] and particularly *Gulati*.[71] Dignity also forms the basis of numerous academic accounts of privacy. For example, it occupies a central role in the work of Bloustein, who sees dignity and the inviolate personality as intrinsically connected, claiming:

> I take the principle of 'inviolate personality' to posit the individual's independence, dignity and integrity; it defines man's essence as a unique and self-determining being.[72]

For Bloustein, instances of intrusion specifically undermine one's dignity, 'assault' one's personality and treat one as less than a person.[73] Fried provides another prominent example, arguing in Kantian terms that everyone is equally entitled to the basic privacy right simply because they are persons and therefore ends in themselves.[74] Elsewhere, Whitman notes the great influence of dignity in European understandings of privacy.[75]

61 Naffine (n 53) 102.

62 References include: 'A modern day successor to the soul', ch 1; 'This is the modern successor to the soul', conclusion; 'The concept of the self has been described [by Martin and Barresi] as a replacement for the soul and the contemporary descendent of the soul', ch 3. Marshall (n 52).

63 Ibid ch 3.

64 McCrudden (n 59) 678. Also 698, 710, 712. Though McCrudden does claim that a 'basic minimum content of the meaning of dignity can be discerned: that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa' 723.

65 Francesca Klug, 'The human rights act – a "third way" or "third wave" Bill of Rights' [2001] (4) European Human Rights Law Review 361, 365.

66 Naffine (n 53) 102. See also 105.

67 *Campbell* (n 14) [50]–[51] (Lord Hoffmann). Quoted in *Ali v Channel 5* (n 17) [148].

68 *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 393, [34].

69 *Mosley* (n 15) [7], [214]–[216].

70 *Sir Cliff Richard v BBC and Chief Constable of South Yorkshire Police* [2018] EWHC 1837, [350], [352].

71 *Gulati* (n 40) [110]–[111], [168]–[169].

72 Emphasis added. *Bloustein* (n 30) 971. See also 994, 995.

73 Ibid 973, 974. See also 1000.

74 Charles Fried, 'Privacy' (1968) 77(3) Yale Law Journal 475, 478.

75 Whitman (n 35) 1151.

So in an influential strand of privacy literature the intrusion metaphor manifests as a spiritual 'inner' self that warrants protection from invasion. As well as numerous explicit references to 'spirits', and 'souls', the foundational concept of 'dignity' acts as a floating signifier that can embrace both secular and religious possibilities, as well as connotations of the 'soul', spirit and innate human value.

1.2 Summary

This part has established that 'intrusion', the transgression of a boundary into an inner, has its origins in physical property, but came to be extended to the person with the emergence of privacy laws and discourse in the late nineteenth century. This development was at least partly in response to anxieties raised by the mass spread of photography. Intrusion now functions as a legal metaphor that structures our experiences and understandings of privacy. In particular, this metaphor plays an important role in constructing a binary between an outer self presented to the world and a 'spiritual' interior that privacy purports to protect from transgression. This inner 'essence', a 'deeper', unique 'true self', may be expressed as a soul, spirit, inviolate personality or innate human dignity. But across these various accounts emerges an incorporeal, amorphous, almost mysterious, precious 'inner' life. It pertains to the emotional, though it cannot be reduced to this and case law clearly indicates that emotional harm is not necessary for an Article 8 infringement.[76] As the remainder of this article demonstrates, this manifestation of the intrusion metaphor is pertinent to photography as it informs judicial approaches to the medium, particularly at ECtHR level.

2 Article 8: personality, image and capture

Article 8 protection for the subjects of photographs is based upon the need to foster personality development. This is influenced by the continental personality right which, as this part argues, shares many features with the spiritual intrusion metaphor. But this part also identifies an apparent divergence in English courts where such personality notions are less influential, particularly in judicial approaches to photographic capture.

2.1 From privacy to personality?

The starting point for Article 8's capacity to potentially protect an individual vis à vis photography is its concern for 'personality'. The ECtHR has stated that Article 8 includes a person's 'physical and psychological integrity',[77] and that it is 'primarily intended to ensure the *development*, without outside interference, of the *personality* of each individual in his relations with other human beings'.[78] The introduction of this terminology is significant because the right to develop one's personality was originally explicitly omitted from the ECHR text.[79] Furthermore, it lends support to claims that the ECtHR has transformed Article 8 into a European civil law-style 'personality right', which entails a

76 *Murray v Express Newspapers* [2008] EWCA Civ 446, [16]–[17]; *Gulati* (n 40) [137], [143]; *Weller v Associated Newspapers Ltd* [2014] EWHC 1163, [196]. For an analysis of Dingeman J's approach in *Weller* see: Kirsty Hughes, 'Publishing photographs without consent'(2014) 6(2) Journal of Media Law 180–92.

77 See also *A v Norway* [2009] ECHR 28070/06, [63].

78 *Pfeiffer v Austri*a (2009) 48 EHRR 8, [33]. See also *X v Iceland* (1976) 6825/74; *Pretty v United Kingdom* [2002] ECHR 2346/02, [61]; *Bensaid v United Kingdom* (2001) 33 EHRR 10, [47]; *Varapnickaite-Mazyliene v Lithuania* (2008) 20376/05, [43].

79 Bart van der Sloot, 'Privacy as personality right: why the ECtHR's focus on ulterior interests might prove indispensable in the age of "Big Data"' (2015) 31(80) Utrecht Journal of International and European Law 25, 28.

positive, broader framing, in contrast with the traditional negative, narrower US account of privacy as merely the 'right to be let alone'.[80]

The concept of 'personality' has its origins in the Enlightenment, and particularly the philosophies of Emmanuel Kant and Georg Hegel whose ideas were utilised by German legal scholars in the late nineteenth century to create a new legal category, '*personlichkeit*'.[81] The concept involves the free development of personality[82] by the exercise of free will or autonomy. In Whitman's terms:

> . . . the defining characteristic of creatures with free will was that they were unpredictably *individual*, creatures whom no science of mechanics or biology could ever capture in their richness . . . the purpose of 'freedom' was to allow each individual to fully realise his potential *as* an individual: to give full expression to his peculiar capacities and powers.[83]

This entailed 'deeper and more complex' notions of freedom than negative liberty because the full development of one's personality necessitated social engagement, not simply seclusion.[84] Nonetheless, the German-based personality right shares four related common features with the privacy literature discussed in Part 1. First, it is intrinsically linked to dignity, the central value of the German Constitution as influenced by Christian natural law, secular theories of autonomy and especially Kant.[85] Second, due to its basis in dignity, the personality right is explicitly concerned with matters of the human spirit; humans are characterised as 'spiritual-moral beings' with an 'intellectual and spiritual identity and integrity'.[86] Third, German personality discourse also relies heavily on boundary metaphors, particularly in relation to this inner-oriented spiritual–moral 'core' or 'Inner Space' (*Innenraum*), though there is no clear divide between inner and outer aspects; 'both are components of an integrated, whole person'.[87] Finally, the personality right also represents a safeguard against the commodification of individuals.[88] As Whitman has shown, these German ideas were an important influence on Warren and Brandeis' advocacy of the 'inviolate personality', even if their attempted 'continental transplant' to US law proved ultimately unsuccessful.[89]

Yet one crucial difference is the additional 'outward'-facing, communal aspect of the personality right.[90] Its 'focus . . . on the capacity of the individual to develop his identity, create his persona and flourish as a unique individual' leads it to encompass a bundle of rights that foster self-determination, self-development and self-presentation.[91] Thus, personality rights recognise the possibility of a more complex, reciprocal relationship

80 Ibid 44.

81 Whitman provides an excellent overview of the emergence of the personality right in German law: (n 35) 1180–9. See also Giorgio Resta, 'Personnalite, personlichkeit, personality' (2014) 1 European Journal of Comparative Law and Governance, 215, 228–35.

82 Article 2(1) German Basic Law.

83 Whitman (n 35) 1181.

84 Resta (n 81) 237–8. For a general account of personality right, see also Patrick O'Callaghan, *Refining Privacy in Tort Law* (Springer Verlag 2013) 16–17, 32–46.

85 Edward Eberle, 'Human dignity, privacy, and personality in German and American constitutional law' (1997) 4 Utah Law Review 963, 971–3.

86 Ibid 973, 975, 982.

87 Ibid 980–94. Note terminology like sphere, barricade, penetrate. See also account of the abandoned 'Sphere Theory' 997–8.

88 Whitman (n 35) 1181–2; Resta (n 81) 226–7.

89 Whitman (n 35) 1203–8.

90 Eberle (n 85) 966–7; 974–5; 979; O'Callaghan (n 84) 44–6.

91 van der Sloot (n 79) 25, 26, 27, 44. See also Resta (n 81) 238; Whitman (n 35) 1161.

between 'outer' and 'inner' aspects of personhood; this nuance is also present in the work of select privacy academics,[92] most notably Goffman.

Goffman's influential work also entails distinctions between an inner and outer, albeit in a more sophisticated form. In Goffman's work on 'face', a form of positive identity or reputation is generated via social interactions.[93] Goffman writes that:

> . . . face clearly is something that is not lodged in or on [one's] body, but rather something that is diffusely located in the flow of events in the encounter and becomes manifest only when these events are read and interpreted.[94]

In this sense, self-image depends upon the conduct and views of other people; it is 'on loan to [one] from society'.[95] Goffman's work thus entails the proposition that the individual 'self' (which may seek to claim privacy) is not a singular, discrete unit, but instead a creation of social interactions.[96] For Goffman, despite appearances, the self does not solely or even primarily emanate *from* the individual. Instead, the self arises via a process of 'joint ceremonial labor' with others,[97] namely from the outside-in, as transient, shifting and multiple selves are projected *onto* the individual:

> In analysing the self, then, we are drawn away from its possessor . . . for he and his body merely provide the peg on which something of collaborative manufacture will be hung *for a time*. And the means for producing and maintaining selves do not reside inside the peg . . . But, well oiled impressions will flow from it fast enough to put us in the grip of one of our types of reality – the performance will come off and the *firm self* accorded each performed character will *appear* to emanate intrinsically from its performer.[98]

Yet, despite its scepticism of a concrete unitary coherent self, Goffman's analysis still rests on a broad dichotomy between 'face', the constructed identity created by other people's interpretations of the behaviour and information one presents to the world, and something else behind or within it. For example, Goffman states that personal and social identities can be 'contrasted with the 'ego' or 'felt' identity, namely the subjective sense of [one's] own situation and [one's] own continuity and character that an individual comes to obtain as a result of [one's] various social experiences'.[99] Elsewhere, Goffman acknowledges a distinction between an individual's (outer) 'face' and his (inner) 'felt identity', whilst simultaneously noting that the 'face' comes to form part of one's 'felt identity':

92 Schoeman, for example, emphasises selfhood and personality in his account of privacy, drawing an analogy between the private and 'the sacred'. He argues that various (outer) guises protect an individual's (inner) core self or, drawing on Goffman's work, multiple selves; nevertheless, there is a need for privacy. F Schoeman, 'Privacy and intimate information' in F Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press 1984) ch 17, 406, 408–10.

93 Goffman defines 'face' as 'the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact. Face is an image of self delineated in terms of approved social attributes – albeit an image others may share.' Erving Goffman, *Interaction Ritual, Essays on Face-to-Face Behaviour* (Pantheon 1967) 5.

94 Ibid 7.

95 Ibid 42, 10.

96 'A correctly staged and performed scene leads the audience to impute a self to a performed character, but this imputation – this self – is a product of a scene that comes off, and is not a cause of it. The self, then, as a performed character, is not an organic thing that has a specific location . . . it is a dramatic effect arising diffusely from a scene that is presented, and the characteristic issue, the crucial concern, is whether it will be credited or discredited.' Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin 1990) 244–5. See also: Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1990) 138.

97 Goffman (n 93) 85.

98 Goffman, *Presentation of Self* (n 96) 245.

99 Author's addition. Goffman, *Stigma* (n 96) 129.

> . . . the word person, in first meaning, is a mask . . . insofar as this mask represents the conception we have formed of ourselves – the role we are striving to live up to – this *mask is our truer self*, the self we would like to be. In the end, our conception of our role becomes second nature and an *integral part of our personality*.[100]

Though Goffman does not explicitly deal with intrusion, his work provides insights that are highly pertinent to privacy and intrusion, particularly in the context of photographs. His work offers a sophisticated account of the relationship between outer 'face' and inner 'felt identity'.

Both continental personality theory and Goffman emphasise the importance of social outward-facing aspects of selfhood. Both show how these 'outer' elements profoundly impact upon one's inner 'spirit' or 'felt identity', albeit in different ways. Personality theory assumes a unified, autonomous core 'inner' that seeks to express itself in the world in order to flourish. Goffman suggests an even closer relation between outer 'face' and inner 'felt identity'. In particular, it reverses narrow liberal assumptions that the self originates from 'within' the individual, and helps us see that external social inputs play a crucial role not only in determining one's outer 'face', but in the process also constitute an important part of one's 'inner' self or selves. In this sense, both theories lend potential support for the proposition that if Article 8 is concerned with protecting a dignitary, spiritual inner life, then it should provide *some* form of protection, where appropriate, for outward-facing activities involving self-presentation and social engagement. The ECtHR's continental-influenced interpretation of Article 8 as primarily intended to foster personality development provides such recognition.

2.2 Image and photographic capture

Its personality rights-influenced approach has led the ECtHR to repeatedly confirm that Article 8 includes a right to one's visual image,[101] on occasion categorising it as an aspect of 'personal identity'.[102] Though an individual's 'image' may be understood to cover a range of attributes in its public presentation akin to Goffman's 'face', the ECtHR's use of the term refers specifically to the individual's physical appearance as captured by photographs. In *Reklos* the ECtHR stated:

> A person's *image* constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his peers. The right of protection of one's image is thus one of the essential components of *personal development* and presupposes the right to control the use of that image.[103]

So one's visual image is relevant in privacy terms because it is a facet, indeed a *primary* attribute, of the personality that Article 8 is concerned with protecting. This assumes that one's physical appearance reveals or expresses *something* about one's personality; that there is some sort of inherent link between the two. Kahn's comment that the *Pavesich* judgment 'assumes a very special relation between one's image and one's self' and sees image as an 'external manifestation' of personality[104] is equally applicable here.

100 Emphasis added. Park quoted with approval by Goffman, *Presentation of Self* (n 96) 30.

101 *Eerikainen* (n 18) [61].

102 *Pfeiffer* (n 78) [33]–[34]. See also *Bogomolova v Russia* [2017] ECHR 13812/09, [51]; *Schussel* (n 6); *Couderc v France* 40454/07 [2015] BHRC 40, [83].

103 Emphasis added. *Reklos* (n 7) [40]. See also *Rothe* (n 7) [42]; *Bogomolova* (n 100) [52]; *Couderc v France* 40454/07 [2015] BHRC 40, [85]; *Von Hannover (No 2)* (n 18) [95].

104 Kahn (n 11) 271.

But English case law sets out a more qualified position on image than the *Reklos* passage above. In the pre-*Reklos Campbell* Baroness Hale stated that English Law '[does] not recognise a right to one's own image . . . The activity photographed must be private.'[105] This broad approach has been applied in subsequent cases, for instance *John*[106] and *Ferdinand*,[107] where claimants unsuccessfully argued that photographs violated their Article 8 right. Yet the *Reklos* passage above has nevertheless been quoted in *Weller*[108] and by the partially dissenting Lords Kerr and Wilson in *JR38*.[109] So it seems there is a potential divergence between the ECtHR and English courts, as highlighted by their respective approaches to photographic capture.

2.2.1 A DIVERGENCE REGARDING PHOTOGRAPHIC CAPTURE?

Photographs fix or capture a moment. In Berger's terms, a photograph 'isolates, preserves and presents a moment taken from a continuum'.[110] Most of the Article 8 cases discussed here involve disputes over the publication of photographs (to be discussed further in Part 3) rather than the initial capture of the shot. The initial recording of an individual's image is afforded relatively little attention in case law. The marginalisation of capture is epitomised by Lord Hoffmann's distinction in *Campbell* between the mere taking of a photograph and its publication, and his claim that in contemporary society people may be photographed without their permission, but this is not an invasion of privacy per se;[111] this influential rationale runs through various cases.[112]

The ECtHR's personality-based approach holds that Article 8 may be engaged by the basic act of taking a photograph. In *Reklos* the ECtHR claimed that the right to control one's image may enable the publication of a photograph to be prevented. But, crucially, 'it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person'. Rejecting the government's arguments that Article 8 was not engaged because the photograph remained unpublished, the ECtHR indicated that the capture was significant per se because:

> . . . an *essential attribute of personality* would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.[113]

The ECtHR's judgment must be seen in light of the particular facts of the case, which involved a photograph of a newborn baby taken on a baby unit without parental permission. The court qualified its judgment by distinguishing these facts from a situation where an individual lays themselves open to the possibility of having their photograph

105 *Campbell* (n 14) [154]. Though this should be viewed in light of subsequent ECtHR jurisprudence discussed in this article.

106 *Elton John v Associated Newspapers Ltd* [2006] EWHC 1611, [15], [21].

107 *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB), [101]–[102].

108 *Weller* (n 76) [61], [62]. See also: *Weller v Associated News* [2015] EWCA Civ 1176, [28].

109 *Re JR38's application for Judicial Review (Northern Ireland)* [2015] UKSC 42, [40]–[41] (Lord Kerr). Lords Kerr and Wilson claimed that the taking of a photograph could engage Article 8, and dissented from the majority Supreme Court finding that Article 8 was not engaged by the police publication of photographs of the 14-year-old appellant involved in rioting.

110 John Berger, *Understanding a Photograph* (Penguin 2013) 20. See also: John Berger, *About Looking* (Bloomsbury 2009) 54–5; Marshall McLuhan, *Understanding Media* (Routledge 2001) 204; Barthes (n 4) 4.

111 *Campbell* (n 14) [73]–[74]. Quoted in *Murray* (n 76) [31]–[32].

112 *Campbell* (n 14) [122] (Lord Hope); *Weller* (n 108) [18]; *Peck v United Kingdom* [2003] EMLR 287, [58]– [59]. See also *Murray* (n 76) [54] ('the focus should not be on the taking of a photograph in the street, but on its publication').

113 Emphasis added. *Reklos* (n 7) [40].

taken.[114] Nevertheless, the rationale in *Reklos* is potentially important because it seems to accept the potential privacy implications of taking a person's photograph, and it sets out a basic right to control one's image in principle. Examples from other jurisdictions illustrate this rationale in practice. In the German case of *Urteil* the Bundesgerichtshof ordered a man who had intimate photographs of his ex-partner to delete them, despite his claims that he did not intend to disseminate them.[115] But the Canadian Supreme Court judgment in *Aubry* (1998) encapsulates this rationale at its strongest. Finding in favour of a young claimant who objected to the magazine publication of a photograph of her sitting on town hall steps, it claimed:

> [F]eeling is likely to be offended each time a photographer invades someone's privacy *or* serves it up to the public. The camera lens captures a human moment at its most intense, and the snapshot 'defiles' that moment. The privileged instant of personal life becomes 'this object image offered to the curiosity of the greatest number'. A person surprised in his or her private life by a roving photographer is stripped of his or her transcendency and human *dignity*, since he or she is reduced to the status of 'spectacle' for others . . . This 'indecency of the image' deprives those photographed of their *most secret substance*.[116]

This rhetorically loaded passage seems to *almost* suggest that photographs steal one's soul. It also expressly indicates that this may arise at capture stage, irrespective of subsequent publication. Yet the *Aubry* dispute focused on publication and the judgment elsewhere implies that the image right arises at this stage.[117] In any event, the broad protection for image in *Aubry* was distinguished from the English position by Baroness Hale in *Campbell*.[118]

To date, English law has paid limited attention to photographic capture, and it has been deemed intrusive per se only in very limited circumstances. Extracting and articulating the legal principles relevant to capture alone is difficult for two reasons. First, as the title of the action implies, 'misuse of private information' assumes that some form of information (e.g. a photograph) already exists, and the doctrine is solely concerned with preventing or remedying its misuse. It is therefore relatively silent on information-gathering actions such as photographic capture[119] because it assumes they have already occurred. Consistent with this, MPI's reasonable expectation test *tends* to entail courts asking whether the claimant has a reasonable expectation of privacy in relation to *information about* their activities, for example a photograph,[120] as distinct from a reasonable

114 Ibid [37]. The ECtHR offers no further elaboration on the kinds of circumstances in which one may do *so,* but this is potentially consistent with Lord Hoffmann's *Campbell* point (above). This *Reklos* caveat was cited by the Court of Appeal in *Weller* (n 108) [27]. Hughes criticises the *Reklos* judgment over its failure to clarify whether Article 8 was engaged by photographic capture per se or the specific circumstances of capture: Kirsty Hughes, 'Photographs in public places and privacy' (2009) Journal of Media Law 1(2) 159–71, 164–5.

115 *BGH, Urteil vom* 13.10.2015 VI ZR 271/14 <https://openjur.de/u/868417.html>. A summary of the case in English is available at <www.bbc.com/news/world-europe-35159187>.

116 Emphasis added. Quoting Ravanas, *Aubry v Les Editions Vice-Versa Inc* [1998] 1 RCS 591, [69].

117 Ibid [53]. It is unclear whether this is due to practical reasons – that the overwhelming majority of disputes arise at publication stage – or doctrinal reasons. The quoted passage would indicate the former.

118 *Campbell* (n 14) [154]. Different aspects of the *Aubry* case are also referred to at [120], [122]–[123] (Lord Hope).

119 Moreham (n 42) 360.

120 '[T]he touchstone of private life is whether *in respect of the disclosed facts* the person in question had a reasonable expectation of privacy.' Emphasis added. *Campbell* (n 14) [21], [25] (Lord Nicholls); [137] (Baroness Hale). See also *Weller* (n 108) [15]; *Hutcheson v News Group* [2011] EWCA Civ 808, [8], [38]–[39]; *RocknRoll v News Group* [2013] EWHC 24, [5], [27], [28]; *Ali v Channel 5* (n 17) [141], [169], [210].

expectation of privacy in relation to their *activities* per se.[121] The former phrasing assumes photographic capture has already occurred and potentially vests a prima facie privacy right in that information; in contrast, the latter vests a prima facie privacy right in the activities, thus leaving open the possibility that photographic capture of them *may* engage Article 8. Second, difficulties are caused by vagueness in the reasonable expectation test.[122] This is strongly context-based, involving an 'intense focus' on relevant facts as listed in *Murray*,[123] but many of these factors are arguably relevant to both capture *and* publication.

Despite such difficulties, it can be discerned that photographic capture assumes a legal significance in four limited circumstances in English law. First, photographs of children as a blanket category are subject to tighter Article 8 restrictions.[124] The explicit aim is to protect children from intrusive media attention, and the Court of Appeal in *Murray* expressly indicated that this includes capture as well as publication.[125] Second, photographs of an individual engaged in intimate sexual activity are viewed by courts as highly sensitive.[126] The illicit capture of such images is viewed as very intrusive,[127] and even if initially taken with consent, publication of such images will be restricted in the event of a later privacy dispute.[128] Third, capture becomes a relevant factor where the disputed photograph has been taken in circumstances of paparazzi harassment.[129] Fourth, 'the absence of consent and whether it was known or could be inferred' is a *Murray* factor that expressly refers to consent at the time of photographic capture,[130] though this factor may also be relevant at rights-balancing stage.[131] Eady J in *Mosley* provided isolated recognition of the Article 8 implications of covert capture in itself, stating that 'the clandestine recording of sexual activity on private property must be taken to engage Art.8'.[132] Yet other cases indicate that the presence or absence of consent to recording is afforded variable weight in English law.[133]

121 But courts do on occasion use this 'reasonable expectation' in this latter sense; *Murray* (n 76) [14], [36]. Or they switch between a reasonable expectation regarding information and activities: *Douglas* (n 15) [100] (Lord Phillips); *Mosley* (n 15) [7], [24], [232]. See also: *JR38* (n 109) [36], [41], [50], [54] (Lord Kerr), though this case did not involve MPI.

122 See e.g. the criticisms of Eric Barendt, 'Problems with the reasonable expectation of privacy test' (2016) 8(2) Journal of Media Law 129–37.

123 *Murray* (n 76) [36].

124 Ibid [57]; *Weller* (n 76) [64]; *Weller* (n 108) [23]–[25], [29]–[31]; *AAA v Associated Newspapers Ltd* [2012] EWHC 2103, [122], [127].

125 *Murray* (n 76) [39], [46], [57]. Yet despite this, the Court of Appeal claimed elsewhere in the judgment that the focus should be on publication of the photograph rather than its capture [54].

126 Theakston (n 12) [114] ('publication of such photographs would be particularly intrusive into the claimant's own individual personality'); *AMP v Persons Unknown* [2011] EWHC 3454, [27]; *Contostavlos v Mendahun* [2012] EWHC 850, [25].

127 *Mosley* (n 15) [17], [104].

128 *Contostavlos* (n 126).

129 This factor was initially cited in *Von Hannover (No 1)* (n 18) [59]. Harassment was cited as a relevant factor, albeit not present on the facts, in *Elton John* (n 106) at [16]. Harassment laws can also be used to protect individuals from paparazzi harassment as in *Hong and Another v XYZ and Another* [2011] EWHC 2995.

130 *Murray* (n 76) [39]

131 *Von Hannover (No 2)* (n 18) specifies the covert nature of photography that captures the subject without their knowledge or consent is also a factor to be considered at rights-balancing publication stage; [113]. See also: *Couderc* (n 103) [86], [135].

132 *Mosley* (n 15) [104]. Note that this example involves an overlap of covert recording and sexual activity.

133 *Ferdinand* (n 107) [101] (the non-covert nature of an unexceptionable photograph was one factor that favoured publication); *Ali v Channel 5* (n 17) [171]–[178] (initial consent of claimants to filming did not amount to true consent); *Elton John* (n 106) [21] (claimant's lack of consent to being photographed was of 'little weight').

2.3 Summary

The continental starting point is that Article 8 provides a right to control one's image in principle, whilst the traditional British starting point has been that one does not generally have such a right. This apparent potential divergence of approach between ECtHR and English jurisprudence remains to be further tested or clarified in the courts, and in any event may fall within the margin of appreciation allowed to member states, particularly in the light of the consistency of ultimate outcomes in many cases. The potential discrepancy is apparent at photographic capture stage, though very few disputes concern capture alone because in practice they tend not to be litigated at this stage; judicial attention is thus inevitably more focused upon the Article 8 implications of publication. Yet photographic recording – as distinct from publication – may become an increasingly important issue with the ubiquity of mobile phone cameras and accompanying 'capture' culture.

The continental personality-based approach is evidently more influenced by the 'spiritual' intrusion metaphor; there is something about the photographic capture of an individual's appearance that may transgress their 'inner' self, spirit or dignity, aside from any emotional harm that may be caused. The *Reklos* court acknowledged the power/knowledge implications of the photograph as a record, irrespective of what is done with it. Capture records an attribute of the subject's personality; furthermore, this record of personality is beyond the control of the subject. More generally, the personality-based approach assumes a continuous intrinsic link between one's visual image (as an expression of personality) and one's inner self. This tends towards potentially stronger protection for image as photographs are more likely to transgress upon one's inner self.

The English position towards image appears more qualified; English privacy law largely chooses to ignore photographic capture. Notions of personality have a limited influence and, aside from occasional fleeting references to dignity, any express 'spiritual' references or connotations are entirely absent. Judges also express concern that greater protection for subjects of photography entails the creation of an 'image right'.[134] However, English law also appears less clear on the issue of capture. Capture per se may be deemed intrusive in limited circumstances, for example where there is paparazzi harassment or covert capture of intimate activity. Beyond this, select circumstances surrounding photographic capture may influence both stages of the MPI test, but the weighting of these factors is highly variable. Further clarification on this issue of capture in English law is needed.

3 Photographs and Article 8: the intrusion of publication

Despite the apparent divergence in approach to Article 8 protection for image discussed in Part 2, the medium of photography is a relevant factor for both the ECtHR and English courts at publication stage. Upon publication, photography is viewed as a medium that exacerbates an intrusion, or even in certain circumstances creates an intrusion that would not otherwise arise. As Nicol J stated in *Ferdinand*:

> *Publication* of photographs can constitute an unacceptable intrusion into privacy even if a verbal report of the same occasion would not. Von Hannover, Campbell, and Murray are all examples.[135]

134 In *Murray* (n 76) the Court of Appeal disagreed that finding in favour of the claimant would create an *image* right because focus should be on publication of the photograph rather than its capture [54]. See also: *Douglas* (n 16) [293], though here Lord Walker was referring to a commercial image right.

135 Emphasis added. *Ferdinand* (n 107) [101].

What are the unique features of photography as a medium that make it intrusive when an alternative medium would not be? The remainder of this article analyses depictions of the medium by judges and cultural commentators to articulate *why* the medium is deemed 'special' and particularly intrusive when published, as well as considering the impact of digital technologies in this area.

But two points about the courts' approach to publication should be initially noted. First, the photographic medium, though relevant, is just one of a range of factors that courts consider when balancing the Article 8 rights of the photographed individual against the Article 10 free expression rights of the publisher. In such cases each competing right is 'weighted' according to the specific circumstances, and the strength of the Article 10 right to disseminate a photograph depends upon the extent to which it forms a necessary part of a story that has a public interest justification, for instance by contributing to a debate of general interest.[136] Many of the disputed photographs in the cases discussed here form part of stories that do not have this dimension and are thus deemed 'lower quality' tabloid expression,[137] or they are seen as extraneous to a story that does have a public interest justification.[138] Second, though cases discussed here primarily concern media publication of photographs for news or tabloid 'entertainment' purposes, other forms of photography may raise different Article 10 issues. For example, privately commissioned photographs, such as professional wedding shots, are automatically barred from publication without consent by UK statute.[139] Additionally, artistic expression is afforded intermediate importance in Article 10 jurisprudence,[140] so photographs exhibited or published for such purposes would be afforded greater weight than tabloid-type claims, though MPI has not dealt with any such art-based disputes to date.[141]

3.1 Distinctive features of the medium

The dissemination of photographic images, as distinct from capture, is the focus of dispute in nearly all Article 8 cases. Claimants seek injunctions to prevent publication or damages where publication has already occurred. According to judges, three related characteristics of photography mark it out as a distinctive, intrusive medium at publication stage. First, photographs capture appearances in great detail; second, they

136 I have provided an account and analysis of the legal principles in this area elsewhere: Rebecca Moosavian, 'Deconstructing 'public interest' in the Article 8 vs Article 10 balancing exercise' [2014] 6(2) Journal of Media Law 234–68, 243–8.

137 *Von Hannover (No 1)* (n 18) [65]; *Campbell* (n 14) [149] (Baroness Hale); *Rocknroll* (n 120) [30].

138 *Theakston* (n 12); *Campbell* (n 14); *Ali v Channel 5* (n 17); *Richard* (n 70). See Part 3.1 ('Truth status of photographs') for further discussion.

139 Section 85(1) of the Copyright Designs and Patents Act 1988 states that a person who commissions photographs or filming for private purposes has a right not to have those works published. Note that this only provides a privacy right to the commissioning party and will not protect any other individuals who may be captured in the professional photographs. Furthermore, this provision only applies to photographs that are commissioned for money or money's worth; *Trimingham v Associated Newspapers* [2012] EWHC 1296.

140 *Campbell* (n 14) [117] (Lord Hope); [148] (Baroness Hale). For further discussion of the ECtHR's approach to artistic expression under Article 10 see: Eleni Polymenopoulou, 'Does one swallow make a spring? Artistic and literary freedom at the European Court of Human Rights' (2016) 16 Human Rights Law Review 511–39, 516, 528.

141 Some such disputes have arisen in the USA, e.g. *Foster v Svenson* (2015) NY Slip Op 03068, 128 AD3d 150. Here a critically acclaimed artist exhibited long-lens photographs of his neighbours (including children) that he had covertly taken through the large windows of their apartments. Strong First Amendment protection for artistic speech overrode the cogent privacy claims, prompting the New York State Appellate Division to call for legislative intervention. The *Foster* judgment provides an overview of similar US cases concerning conflicts between image rights and artistic expression.

make the audience spectators; and, third, they generally enjoy the status of truth. Aided by leading cultural theorists, these features are now analysed in turn.

3.1.1. Photographic appearances: worth a thousand words?

Photographs capture what a person or events looked like. In doing so, according to Sontag, 'the camera has . . . [effected] a tremendous promotion of the value of appearances. Appearances as the camera records them'.[142] Berger also makes the point that photographs depict appearances, 'with all the credibility and gravity we normally lend to appearances – prised away from their meaning'.[143] Both critics seem to employ an implicit distinction between the 'appearances', the surface depicted by photographs and an (unspoken) 'reality' to which the medium is applied. By privileging 'appearances', they suggest that photographs change *how* we see and what we value, matters afforded further discussion in this part.

Furthermore, photographs are 'information rich' and provide more detail than text-based information. Judicial acknowledgment of this is evidenced by recurring judicial use of the commonplace maxim 'a picture is worth a thousand words'. For example, when the Court of Appeal discharged an interim injunction to restrain the publication of surreptitiously taken wedding photographs in *Douglas*, Keene LJ stated:

> The photographs conveyed to the public *information not otherwise truly obtainable*, that is to say, what the event and its participants looked like. It is said that a picture is *worth a thousand words*. Were that not so, there would not be a market for magazines like 'Hello!' and 'OK!' The same result is not obtainable through the medium of words alone, nor by recollected drawings with their inevitable inaccuracy.[144]

Later in *Campbell*, Lord Nicolls (dissenting) stated: 'In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words.'[145] Baroness Hale made similar comments regarding the nature of photographic information:

> A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like.[146]

Repeated judicial use of this maxim suggests that photographs provide more information than equivalent text, but also that they have greater impact and emotional power. This point has also been acknowledged by the ECtHR[147] and is replicated in other areas of law, for example contempt of court[148] and copyright.[149]

142 Sontag (n 1) 87.

143 Berger, *About Looking* (n 110) 55.

144 *Douglas and Others v Hello! Ltd* [2001] QB 967 (CA), [165] (Keene LJ).

145 *Campbell* (n 14) [31].

146 Ibid [155]. See also *Richard* (n 70) [318]: 'Adding impact is, after all, the purpose of adding pictures to a story. That is what the BBC did, quite handsomely.'

147 The ECtHR make this point regarding audiovisual media more generally, stating in *Peck* (n 112) [62]: 'It is "commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media".'

148 'The visual image of the defendant Ward was designed to have an impact. That is why it was published.'; *AG v Associated Newspapers* [2011] EWHC 418 (Admin), [51], [41].

149 Rebecca Tushnet, 'Worth a thousand words: the images of copyright' (2012) 125(3) Harvard Law Review 684, 690–1, 694–5.

In *D v L* (2003) Waller LJ briefly stated the principles regarding photographs, suggesting they applied similarly to the audio-recordings of conversations which were the subject of this particular dispute. He stated:

> . . . a photograph is more than the information you get from it. A court may restrain the publication of an improperly obtained photograph *even if the taker is free to describe the information which the photograph provides* or even if the information revealed by the photograph is in the public domain.[150]

Waller LJ's comments provide further confirmation that the photographic medium per se may be a factor that determines an Article 8 violation. Yet such understandings of photographs are not unanimous. For example, in *Campbell* Lord Hoffmann recited the 'thousand words' maxim and acknowledged that photographs are 'more vivid' than words. But he underplayed the significance of such a distinction, claiming that the same principles for assessing privacy invasions applied to both: 'In my opinion a photograph is in principle information no different from any other information.'[151] Despite this isolated claim, case law clearly indicates a judicial consensus that photographs are indeed different, and that their informational richness may pose acute privacy implications. This is arguably because photographs simultaneously provide both partial and full information; partial in that they capture only the *appearance* of *one* specific moment from a flow of events, but also full because they record that moment in a very high level of detail. Yet, intriguingly, a photograph is also '*more* than the information you get from it'.

3.1.2 Photographs make one a spectator

McLuhan categorises photography as a 'hot medium'; that is 'one that extends one single sense [in this case, vision] in "high definition"'.[152] By depicting the appearances of people and events at a given moment, photographs make one a spectator. This feature of photographs was briefly outlined by Lord Walker in *Douglas*, who claimed: 'They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts.'[153] Lord Nicholls took a similar approach when *Douglas* reached the House of Lords, claiming:

> Photographs are much the best way of conveying an impression of how everybody looked at a wedding. Photographs *make one a spectator* at the wedding. Information communicated in other ways, in sketches or descriptive writing or by word of mouth, cannot be so complete or accurate.[154]

Judges here are employing the 'visual' model of photography. On this understanding, the photograph delivers detailed visual information about the captured individual to the onlooker, in effect placing them at the scene.[155] The act of observation plays a central role in understandings of privacy. For example, Scanlon indicates that privacy norms are concerned with not being observed, seen, kept track of and so on,[156] claiming 'our

150 Emphasis added. *D v L* [2003] EWCA Civ 1169, [23] (Waller LJ). Quoted in *Douglas* (n 15) [86]; *Mosley* (n 16) [18]. See also *Ferdinand* (n 107), [101].

151 *Campbell* (n 14) [72]. See also [169] (Lord Carswell).

152 Author's addition. *McLuhan* (n 110) 24. Hot media leave less 'to be filled in or completed by the audience' 24–5.

153 *Douglas* (n 15) [84]. Quoted in *Mosley* (n 15) [19]. A television programme's broadcast of the claimants' eviction was similarly held to have 'a voyeuristic quality' in *Ali v Channel 5* (n 17) [215].

154 Emphasis added. See also *Douglas* (n 16) [251] (Lord Nicholls).

155 This position is critiqued in Joel Snyder and Neil Walsh Allen, 'Photography, vision, and representation' (1975) 2(1) Critical Inquiry 143–69, 149, 152.

156 Thomas Scanlon, 'Thomson on privacy' (1975) 4(4) Philosophy and Public Affairs 315–32, 315, 316.

conventions of privacy are motivated by our interests in being free from specific offensive observations'.[157] Similarly Gavison, who sees privacy as control over access to ourselves, claims that an individual loses privacy when they are subjected to attention: 'Attention is a primary way of acquiring information and includes e.g. staring, listening or other observation.'[158] Benn also argues that a minimal right to immunity from uninvited observation is a basic feature of our conception of a person.[159] So, though intrusion need not occur via observation and can occur via other senses,[160] it is primarily understood in visual terms. This emphasis on observation is perhaps unsurprising; throughout Western history, from the Greeks to the Enlightenment, human thought and culture has privileged the sense of vision,[161] for example via the Enlightenment's veneration of the detached empirical observation employed by the sciences.[162] Yet in the context of privacy, observation raises problematic implications. This is most aptly highlighted by Foucault's seminal critique of the panoptical gaze in *Discipline and Punish*[163] in which he draws out the dominatory potential of seeing.[164] Foucault's suspicion of ocularcentrism recurs across a number of his works, and forms part of a tradition of twentieth-century French theory that critiqued vision as alienating and objectifying.[165]

The objectifying nature of photography is widely acknowledged and is of particular interest to feminist writers.[166] Barthes pithily summarises its effect thus:

> Photography transformed subject into object.[167]

Sontag also expresses concerns about such objectifying tendencies, claiming that photographs enable others to see a person in ways that the captured individual cannot, for instance by revealing faces as 'social masks'.[168] Photography 'turns people into objects

157 Ibid 320.

158 Ruth Gavison, 'Privacy and the limits of law' (1980) 89(3) Yale Law Journal421–71, 432.

159 Stanley Benn, 'Privacy, freedom and respect for persons' in Schoeman (ed) (n 92) ch 8, 224, 232. See also Moreham, whose definition of intrusion entails observation and/or visual recording, though allowance is also made for overhearing (nn 20 and 42).

160 See also Richard Parker, 'A definition of privacy' (1974) 27 Rutgers Law Review 275, 280–2.

161 An interesting historical overview of the dominance of the visual, and reasons for it, is provided by Bernard Hibbitts, 'Making sense of metaphors: visuality, aurality, and the reconfiguration of American legal discourse' (1994) 16 Cardozo Law Review 229, 245–64. See also Thomas R Flynn, 'Foucault and the eclipse of vision' in David M Levin (ed), *Modernity and the Hegemony of Vision* (University of California Press 1993) 273–86, 274–5; Martin Jay, 'In the empire of the gaze: Foucault and the denigration of vision in twentieth century French thought' in David Couzens Hoy (ed), F*oucault: A Critical Reader* (Basil Blackwell 1986) 176.

162 Hibbitts (n 161) 293–6.

163 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin 1991).

164 Flynn (n 161) 275: 'The shift from a detached, contemplative view to a dominating gaze is essential to Foucault's conception of modernity.'

165 Jay (n 161) 180–93, 195. See also Martin Jay, 'Sartre, Merleau-Ponty and the search for a new ontology of sight' in Levin (ed) (n 161) 143–85.

166 See e.g. Naomi Wolf, *The Beauty Myth: How Images of Beauty are Used against Women* (Vintage 1991); Laura Mulvey, 'Visual pleasure and narrative cinema' in Leo Braudy and Marshall Cohen (eds), *Film Theory and Criticism: Introductory Readings* (Oxford University Press 1991) 833–44. For a feminist critique of the role of copyright law in empowering (predominantly male) authors vis à vis their recorded (predominantly female) subjects, see John Tehranian, 'Copyright's male gaze: authorship and inequality in a panoptic world' (2018) 41 Harvard Journal of Law and Gender 6–59 <https://ssrn.com/abstract=3005920>.

167 Barthes (n 4) 13.

168 Sontag (n 1) 59.

that can be symbolically possessed',[169] though the possibilities for subjects to resist and disrupt photographic objectification in specific contexts must also be acknowledged.[170]

But just as photographic information is seen as distinct from equivalent textual information, some treat photographic seeing as fundamentally different in nature to the act of seeing in daily life, i.e. actually witnessing a scene. Numerous critics note the impact of photography on the visual senses, claiming that it changes *how* we see. For Berger, 'Photography is the process of rendering observation self-conscious.'[171] For Sontag, photography 'changed seeing itself, by fostering the idea of seeing for seeing's sake'. The resulting observation of the photograph's audience is detached, even alienated, from the subject matter depicted.[172]

Consistent with this alternative view, there has been judicial acknowledgment that viewing a photograph *is* materially different from witnessing the live scene. In *Weller v Associated News*, where the claimant sought damages for publication of photographs of his children walking on the streets of Los Angeles, Dingemans J suggested that photographic seeing entails a very specific way of viewing that distinguishes it from the observation of a bystander:

> The particular importance attached to photographs in the decided cases is, in my judgment, a demonstration of the reality that there is a very relevant *difference* in the potentially intrusive effect of *what is witnessed* by a person [spectator] on the one hand, and the publication of a *permanent photographic record* on the other hand.[173]

This passage highlights the key difference; photographic seeing entails the viewing of a *record*; unlike actual events, the image is fixed, infinitely reproducible and permanent. Related to this point, a further crucial distinction between regular and photographic vision is offered by Benjamin who claims photography can enlarge and capture images beyond natural optics, namely those that would not be within the capacity of ordinary sight. Additionally, photographic seeing can be differentiated by the sheer scale of the potential audience it enables. The courts do acknowledge the potential mass reach of the medium via their recognition, technically at least, of each individual act of viewing a photograph. The approach is illustrated by the Court of Appeal in *Douglas*:

> Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be *a fresh intrusion of privacy when each additional viewer sees the photograph* and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it.[174]

This proposition that each additional individual viewing creates a new, separate intrusion applies to any private information irrespective of medium.[175] But, by implication, each

169 Ibid 14.

170 Linda Mulcahy, 'Docile suffragettes? Resistance to police photography and the possibility of object–subject transformation' (2015) 23(1) Feminist Legal Studies 77–99.

171 Berger, *Understanding a Photograph* (n 110) 19.

172 Sontag (n 1) 93, 97, 99.

173 Emphasis added. *Weller* (n 76) [63]. See also: *Murray* (n 76) [50]; *Peck* (n 112) [62] where the ECtHR stated: 'the relevant moment [of the aftermath of the applicant's suicide attempt] was viewed to an extent that far exceeded any exposure to a passer-by or to security observation'.

174 *Douglas* (n 15) [105]. Quoted in *Contostavlos* (n 126) [25]. See also: *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [88] (Lord Toulson).

175 PJS (n 175) [24]. For an analysis of this, see Rebecca Moosavian, 'Jigsaws and curiosities: the unintended consequences of misuse of private information injunctions' [2016] 21(4) Communications Law 104–15.

additional viewing of a private photograph remains materially different to, for example, each additional reading of text-based information. Nevertheless, this quantitative, highly atomistic, liberal conception of dissemination further conflicts with judicial reliance on the 'visual' model that equates viewing a photograph to being present at the scene.

3.1.3 The truth status of photographs

A final, crucial characteristic of the photographic medium, its capacity to verify, also becomes an issue at dissemination stage and warrants further attention. Judicial use of photographs as verifying evidence occurred with the emergence of the technology in the nineteenth century.[176] Numerous contemporary judicial comments continue such long-standing understandings that photographs provide evidence in a disputed story. For example, in *Campbell* Lord Hoffmann accepted that photographs in the disputed story were necessary to provide verification[177] and Lord Carswell deemed the accompanying photographs a 'powerful prop' to the written article.[178] In *Douglas* Lord Nicholls stated that photographs are more complete and accurate than other forms of information[179] and his fellow dissenter Lord Walker claimed:

> Photographs are also regarded (despite the ample opportunities for manipulation which modern technology affords) as providing *powerful corroboration* of written reports of conduct which the person photographed might wish to deny.[180]

The ECtHR also noted this verifying capacity of photographs in *Von Hannover (No 2)*.[181] Despite such widespread judicial views, various essayists question the basic relation between photographs and truth, suggesting that it is more ambiguous than these judicial comments indicate. In particular, what precisely can a photograph verify? And to what extent does photography transparently record events as distinct from constructing them?[182] These two issues will be discussed in turn.

Like the judges outlined above, many cultural theorists acknowledge a photograph's evidential force, albeit in qualified, ambivalent terms. Sontag speaks of 'the *presumption* of veracity that gives all photographs authority'.[183] Berger summarises the position thus:

> In itself the photograph cannot lie, but, by the same token, it cannot tell the truth; or rather, the truth it does tell, the truth it can *by itself* defend, is a limited one.[184]

176 For an excellent discussion of the history of photographs in the court room, see Jennifer Mnookin, 'The image of truth: photographic evidence and the power of analogy' (1998) 10(1) Yale Journal of Law and Humanities 1–74.

177 *Campbell* (n 14) [63] (Lord Hoffmann).

178 Ibid [165] (Lord Carswell).

179 *Douglas* (n 16) [251] (Lord Nicholls).

180 He goes on to say this is not that sort of case

:. ibid [288].

181 The ECtHR upheld the German court's finding that the photographs in that article 'supported and illustrated the information being conveyed' and 'there was a sufficiently close link between the photo and the event described in the article': *Von Hannover (No 2)* (n 18) [117]. The proximity of the photograph to the relevant story of general interest was also noted as a factor in *Rothe* (n 7) [57]. See also *Couderc* (n 103) [135]. But in *Richard*, the court held that film footage of a police search of the claimant's property did not verify any useful or important aspect of the disputed story – it simply created unnecessary drama: *Richard* (n 70) [300].

182 This latter question is also an issue with legal language which I have explored elsewhere. Moosavian (n 36).

183 Sontag (n 1) 6.

184 Berger, *Understanding a Photograph* (n 110) 70. More generally, see also William J Mitchell, *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (MIT Press 2001) 23–49.

Berger claims this is particularly the case when photographs are used for communication purposes as distinct from official, identity functions (e.g. passports).[185] But what is the limited truth that photographs *can* provide? Barthes explains that the photographs can verify that at a specific point in time the subject matter captured was indeed present:

> Photography never lies: or rather, it can lie as to the meaning of the thing . . . never as to its existence.[186]

The view that photographs are weak in meaning despite their informational richness is shared by Berger. He depicts a reciprocal, symbiotic relationship between text (which photographs support and verify) and photographs (that require meaning or interpretation, often afforded by words):[187] 'Together the two then become very powerful; an open question appears to have been fully answered.'[188]

The second issue of whether photography objectively records or subjectively constructs events is a longstanding debate within photography literature. One major factor influencing the view that photography objectively documents people and events is the transparency or invisibility of the medium itself.[189] Sontag claims that photographs seem to be miniature pieces of reality, likening them to 'a trace, something directly stencilled off the real, like a footprint or a death mask'.[190] And Mnookin shows that this view of photographs as direct transcripts of nature was one of two competing paradigms employed by nineteenth-century US courts to understand new photographic technology. This model understood the photograph as an unbiased mechanical witness that communicated the truth, and in doing so it minimised or overlooked the human role in the process of capture.[191] Malkan claims that this transparency assumption continues in privacy law;[192] photographs are viewed as providing 'an uncurtained window' onto the subject who is 'carelessly revealed'.[193]

Despite its apparent objectivity, many cultural commentators argue that a photograph cannot be a wholly objective record; it simply represents a subjective interpretation of the world.[194] This is because each photograph rests upon a series of social and cultural variables. This second paradigm identified by Mnookin emphasises photographs as a form of representation, as a human construction and thus fallible; it correspondingly emphasises the various human choices involved in taking any photograph.[195] For example, the captured image depends upon what the individual photographer sees and chooses.[196] Snyder and Allen claim that photographers exercise a series of choices over matters such as equipment, camera positions and angle, how a situation is 'set up'; they

185 Berger, *Understanding a Photograph* (n 110) 71.

186 Barthes (n 4) 87. See also: 76, 82, 85. See also: Berger, *Understanding a Photograph* (n 110) 62.

187 On the need for additional explanation for images, see also Roland Barthes, *Image Music Text* (Fontana 1977), 'The photographic message' 15–31; Jessica Sibley, 'Images in/of law' (2012–2013) 57 New York Law School Law Review 171, 172.

188 Berger, *Understanding a Photograph* (n 110) 66, 71. This point is also made by Tushnet (n 149) 690.

189 Barthes (n 4) 5, 6. See also: Berger, *About Looking* (n 110) 52–3.

190 Sontag (n 1) 154, 4.

191 Mnookin (n 176) 14–20.

192 Malkan (n 11) 781–2.

193 Ibid 794–5.

194 Sontag (n 1) 6–7: 'Although there is a sense in which the camera does indeed capture reality, not just interpret it, photographs are as much an interpretation of the world as paintings and drawings are.' See also Joel Snyder, 'Picturing vision' (1980) 6(3) Critical Inquiry 499–526, 507–10.

195 Mnookin (n 176) 20–7.

196 Sontag (n 1) 88–9: '[P]hotographs are evidence not only of what's there but of what an individual sees, not just a record but an evaluation of the world.'

exercise judgement, informed by background knowledge and cultural taste, to select what to include and exclude.[197] Thus a captured object does not have one single image, but an almost infinite number because: 'The image is a crafted, not a natural, thing . . . how [an object] will be represented is neither natural nor necessary.'[198] Interestingly, this degree of selection and judgement exercised by the photographer is acknowledged in UK copyright law, where the making of such 'free and creative choices' is deemed to confer the originality required for copyright to subsist in a photograph.[199] So photographs are inevitably influenced by the wider culture in which they are taken and viewed[200] and, in turn, come to construct the culture they become part of. Furthermore, the meaning and interpretations attributed to photographs will vary according to surrounding context and the individual onlooker's position: 'A photograph changes according to the context in which it is seen . . . As Wittgenstein argued for words, that the meaning is the use – so for each photograph.'[201]

Three Article 8 cases aptly illustrate the inherent limitations of a photograph's ability to verify.[202] In *Mosley v News Group*, the meaning of footage of the claimant engaged in uniformed sexual activities with sex workers was bitterly contested. Did these images depict disciplinary role play as the claimant contended, or, as the defendant claimed, did they reveal a sinister Nazi theme to the activities which would provide a strong public interest dimension favouring the defendant? The stills and footage were unable *in themselves* to confirm either interpretation. So ultimately, the defendant newspaper's Nazi theme allegations were only deemed unfounded at trial in light of close examination of the surrounding witness evidence.[203] Similarly the parties in *Rothe v Austria* disagreed as to the meaning of the disputed photograph which showed the applicant, a Catholic church official, kissing a student priest at a party. The applicant had claimed that the photographs could be interpreted in different ways and did not prove any homosexual activity, but merely a friendly embrace; any impression of a French kiss was 'an optical illusion'.[204] The applicant's request to obtain expert evidence in photographic analysis was rejected as the national courts held that the judge could interpret the photographs for herself in light of surrounding evidence. This evidence included a witness who confirmed the applicant's French kissing activities at the party.[205] In both of these cases, context confirmed (or

197 Some of these choices may not be operational at the scene but take effect in the final print. Snyder and Allen (n 155) 150–1; especially the analysis of a photograph of James Dean at 165–8.

198 Ibid 151.

199 In *Painer v Standard Verlags GmbH* [2012] ECDR 6 the CJEU held that a photographer's choices regarding e.g. background, subject's pose, lighting, framing, angle, composition and atmosphere created were sufficient to meet the 'author's own intellectual creation' test for the originality requirement for copyright protection. In T*emple Island Collections v New English Teas Ltd* [2012] EWPCC 1 Birss J held that there were three aspects where there was room for originality in photographic works: (1) choices of angle, light, exposure, effects etc; (2) choices to create the scene to be captured, such as composition etc; (3) aspects deriving from a photographer being in the right place at the right time. For an interesting discussion of the challenges copyright has faced in assessing the photographer's creative choices and originality, see Justin Hughes, 'The photographer's copyright – photographs as art, photographs as database' (2012) 25(2) Harvard Journal of Law and Technology 339.

200 Berger, *Understanding a Photograph* (n 110) 67.

201 Sontag (n 1) 106.

202 See Mnookin's discussion of the US *Mumler* case of 1869, which involved disputed photographs of 'spirits'. Did the photographs establish evidence of the existence of spirits, or of fraud on Mumler's part (n 176) 27–40?

203 *Mosley* (n 15) [122]–[123].

204 *Rothe* (n 7) [29], [8].

205 Ibid [12], [14], [17].

perhaps created) the meaning attributed to the photographs. A final example of context creating meaning is afforded by *Bogomolova* where the ECtHR agreed that unauthorised publication of a photograph of the applicant's son on an adoption brochure inferred he was an orphan and created a false and prejudicial impression that he had been abandoned.[206]

Elsewhere, the limitations of a photograph's accuracy are also noted in somewhat ambivalent comments by the Court of Appeal in *Douglas*. Whilst acknowledging the degree of detail a photograph might capture, it went on to state that: 'A personal photograph can portray, *not necessarily accurately*, the *personality* and the mood of the subject of the photograph.'[207] Ultimately then, the dual nature of photographs must be acknowledged[208] and lends weight to Barthes' claim that photography is 'a loaded evidence'.[209] The medium *is* the message, even (or perhaps especially) in an apparently transparent one.[210]

3.2 Photographic intrusion: commodification and digitisation

The preceding discussion has established that photography creates a permanent, infinitely replicable record of the individual's image that can be disseminated to the objectifying gaze of a mass audience; photography thus enables commodification of the individual's image. Amongst audiences (including judges), photographs enjoy a truth status, fostering the impression that the image is what they would have seen had they been at the scene. But the medium also leads viewers to overlook the myriad variables that gave rise to what lies within the frame and what lies beyond, and also the photograph's inability to verify the meaning of the depicted subject matter (which is reliant on surrounding culture and text etc.). It is these complexities and ambiguities of the medium that make it so distinctive and problematic in privacy terms. More generally, photography changes our visual culture by fostering seeing for its own sake and alienating audiences from the images they view. Photography enables the dissemination of a detailed record of an event that might not otherwise have been seen, even by those at the scene. Photography thus contributes to a vision-based culture that lends itself to privacy intrusion, as well as increasing practical opportunities for intrusive observation.

Courts confirm that *publication* of photographs may be particularly intrusive (even where capture might not be), and they briefly identify features of the medium to explain why. But the particular sense in which the ECtHR and English courts use the term 'intrusion' is unclear. Generally, the term is used in various shifting metaphorical senses that are difficult to pin down, including the transgression of the Article 8 right and/or behavioural boundaries, but also, on occasion, with reference to inner feelings consistent

206 *Bogomolova* (n 102) [57].

207 Emphasis added. *Douglas* (n 15) [106]. Quoted in *Contostavlos* (n 126) [25].

208 Berger, *Understanding a Photograph* (n 110) 66: 'Are the appearances which a camera transports a construction, a man-made cultural artefact, or are they, like a footprint in the sand, a trace naturally left by something that has passed? The answer is both.' Mnookin also argues that in courts photographs were treated as fulfilling both functions (verification and illustration) simultaneously: (n 176) 71.

209 Barthes (n 4) 115.

210 McLuhan (n 110) 9; 19: '[I]t is the medium that shapes and controls the scale and form of human association and action. The content or uses of such media are as diverse as they are ineffectual in shaping the form of human association.'

with the 'spiritual' metaphor, for example in *PJS*,[211] *Von Hannover (No 1)*[212] and notably *Theakston*.[213] More specifically, the English courts, for example in *Goodwin*[214] and *CTB*,[215] have suggested that intrusion is a component of Article 8, and have referenced Moreham's work[216] as a basis for this, though they have not elaborated or developed it further.

Despite the fact that it does not comfortably accord with the tendencies of English law, the continental personality rights tradition and the work of Goffman can offer further insights as to *why* the distinctive features of photographs are so potentially intrusive in an emotional–spiritual sense. Both emphasise the 'outer' communal engagement aspect of personality and, crucially, its close reflection of and bearing upon inner self or 'felt identity'. They show how dissemination of one's photographic image may transgress upon one's 'inner' spiritual or dignitary core and related autonomy; via publication, the photographed individual loses control of this aspect of their 'outer' face (or faces), and, by implication, their 'inner' felt identity which depends on it.

As discussed in Part 2.1, Goffman distinguished between 'inner' felt identity and multiple, shifting 'outer' selves that arise across various face-to-face social interactions (e.g. professional, familial, sexual etc.) and which are facilitated by audience segregation. Disseminated photographs can contribute to a person's outer face or faces. But Goffman noted that fame creates difficulties for audience segregation and entails less control of one's biography.[217] Photographs take interaction away from the locus of the real-life subject; instead a remote and asymmetrical interaction occurs between the viewer and the fixed image (mediated by surrounding text and culture). In this way, photographs enable one's eidolons to be subjected to public gaze in manners one may have no control over. A person's widely disseminated photographic image may take on alternative meanings which enjoy the status of 'truth', but which the subject has had no involvement in constructing. These photographs and surrounding narratives form part of the 'face' projected onto the individual, tying them to commodified, powerful and enduring images that may be at odds with, or indeed represent all too accurately, their inner felt identity. This is not just relevant to traditional reputation-based actions such as defamation,[218] but forms an integral aspect of privacy itself when understood in personality-based terms. It also becomes ever more problematic in the digital era.

Though the Article 8 cases discussed here involve traditional media publication, the principles have broader application to the digital realm where most photographic dissemination now occurs. Digital technology has effected three material changes to the creation and publication of photographs that have implications for this area of law. First, the technology enables quicker and wider dissemination, and its instant global reach may

211 See repeated references to feelings of 'intrusiveness and distress' the claimant and his family would feel: *PJS* (n 174) [35] (Lord Mance); [53], [61] (Lord Neuberger).

212 The ECtHR said tabloid photographic harassment could 'induce' a 'very strong sense of intrusion' or even 'persecution': *Von Hannover (No 1)* (n 18) [59].

213 '[P]ublication of such photographs would be particularly intrusive *into* the claimant's own individual personality.' Emphasis added. *Theakston* (n 12) [78].

214 *Goodwin v News Group* [2011] EWHC 1437 QB. Quoted in *PJS* (n 174) [58] (Lord Neuberger).

215 *CTB v News Group* [2011] EWHC 1326, [23]. Though Moreham is not specifically referenced here.

216 See discussion in Part 1.

217 Goffman, *Stigma* (n 96) 88. See also 81.

218 See e.g. Alastair Mullis and Andrew Scott, 'Reframing libel: taking (all) rights seriously and where it leads' (2012) 63(1) Northern Ireland Legal Quarterly 5–25.

be resultingly harder to limit or control in practice.[219] Second, digital photographs are highly manipulable[220] via widely available editing and filter technologies; the constructed (often highly idealised and curated) nature of photographs is now a banal feature of online life and suggests greater awareness of photography's ambiguous relation to truth. Third, the digital era has witnessed a proliferation of photographic dissemination via, for example, posting on social media sites. So the privacy implications of publication are no longer restricted to public figures or elites, and most individuals have a potential stake in whether (and how) law deals with matters of information control, self-presentation and commodification more generally.[221]

Conclusion

This article set out to ascertain *why* the courts treat photography as special and intrusive relative to other forms of information. It has come to two related conclusions; the first, about the photographic medium; and the second about the terminology of 'intrusion'. First, though any intrusion into privacy will be highly context-specific, this article has examined the distinctive properties of photography that may cause or exacerbate intrusion, though these are only accorded recognition when publication occurs. At dissemination stage, there arise significant but overlooked tensions in the medium that mean it is not *quite* what it seems. First, photographs provide full (i.e. very detailed) *and simultaneously* partial information (of mere appearances at one single moment). Second, photographs seem to make the viewer a witness at the scene despite fundamental differences between observing first-hand and via a fixed, framed image with mass reach. Third, a photograph seems to offer truth, but is also a subjective interpretation of events and lacks capacity to verify its own meaning. Though select judicial comments indicate brief, isolated acknowledgment of some of these points, the courts do not express an awareness of the inherently ambiguous, variable nature of the medium, lending weight to Sherwin's calls for a 'visual prudence in law'.[222]

Second, despite its range of meanings, 'intrusion' is not currently employed in Article 8 case law in a technical, doctrinal sense. But it is instrumental in constructing an inchoate 'inner essence' that recurs in various guises across privacy discourse as the soul or spirit, and that is represented in Article 8 case law via the continental notion of personality and the related floating signifier of dignity. Both of these concepts contain allusions to spirit, emotion and a 'sacred' inner life; they also form the crucial stated foundations for Article 8 protection. This 'inner' aspect features more explicitly in the continental tradition adopted by the ECtHR, as evidenced by its *Reklos* finding that Article 8 can provide protection for image in itself because it is a chief attribute of personality. Such influences are far weaker in English privacy law, but these non-rational traces are still subtly at play via fleeting references to dignity and references to feelings of intrusion. Ultimately, then, though contemporary Article 8 jurisprudence certainly does not go as far as to perpetuate the myth that 'photographs steal souls', it does on occasion adopt reasoning that contains echoes of it.

219 Moosavian (n 175). Yet, despite this the Supreme Court made ambiguous comments that indicated that online dissemination of photographs is less intrusive than publication via traditional media, though the precise reason for this is not entirely clear and seemed, at least partly, to be the paparazzi attention that comes with traditional media coverage; *PJS* (n 174) [31],[35],[61].

220 Mitchell (n 184). 221 Though personality rights-based protection for image should not be overstated and would not extend Article 8 protection to minor, inconsequential aspects of self-presentation or image management.

222 Richard K Sherwin, 'Visual jurisprudence' (2012–2013) 57(1) New York Law School Law Review 11, 38. See also Sibley (n 187).